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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 150.

W. A. SHIELDS,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Question Presented.

Petitioner's brief does not correctly state the question involved. In fact, it may be that the ingenious but inaccurate presentation, in the petition for writ of certiorari, of the question involved influenced the Court to grant the writ.

Petitioner complains that the Court of Appeals held that the dome step board was not a running board (B. p. 4). In the face of that ruling from which he has appealed he persists in presenting the question involved on the assumption that the dome step board is a running board and that the Interstate Commerce Commission was derelict in not so classifying it.

The questions presented here are:

1. Is the dome step board on a tank car a safety appliance under the terms of 45 U. S. C. Section 11,

or the regulations of the Interstate Commerce Commission issued under Section 12 thereof (Secs. 131.8 and 131.9, Title 49, Code of Federal Regulations).

2. Can the petitioner, not an employe of any railroad (admittedly an independent contractor for consignee (B. p. 2)), invoke the protection of the Safety Appliance Act?

Statement.

On May 6, 1952, petitioner, an independent contractor, was instructed by the consignee of a tank car of gasoline to unload the tank car which had been placed on a siding in the freight yards of the respondent, Atlantic Coast Line Railroad Company, in Montgomery, Alabama (R. 24, 25, 117, 118, 130, 131). At the time of his injury petitioner had been engaged in the business of unloading gasoline and related work for about twenty-five years (R. 129). The gasoline in the tank car which petitioner was to unload (SHPX 21336) was released out the bottom of the car by means of a flexible hose (R. 129, 130). But in order for the gasoline to flow out of the tank it was necessary for the dome cap on the top of the car to be removed and a valve inside the dome to be opened (R. 130).

Petitioner went to the top of the tank car, took the dome off, went back to the ground and coupled the hose through which the contents of the car would unload. He then went back up to the dome to show his helper how to open the valve. Frank Watkins, petitioner's helper, stated that both he and petitioner were standing on the dome step board when it broke (R. p. 119, p. 122) and petitioner fell to the ground.

Petitioner went back to the dome again, finished unloading the car and continued to work without interruption or loss of time until July, 1953, more than fourteen months

after the accident (R. p. 142) when he spent five days in the hospital. He claims total lost time of 120 hours at $2.00 an hour and medical expenses of $342.65. X-rays were not taken until twelve months after the accident. The jury verdict was $7,500.00.

The dome step board "looked safe enough" (R. p. 138). It held the weight of petitioner on two trips and held weight of his helper, Watkins, but when both of them stood on the board at the same time it broke. The board looked like it had been painted two or three months before and no defect was apparent. Petitioner climbed over it and stood upon it several times. It was newly painted and looked like a new board (R. p. 242).

Petitioner originally brought this action to recover on allegations of negligence in failing to maintain safe and secure wooden structures around the dome of the tank car. The complaint was later amended to present an additional count, charging violation of the Safety Appliance Act. The District Court submitted the case to the jury for a general verdict on the two counts. The Circuit Court held the rulings of the District Court as to the count involving the Safety Appliance Act were in error, and the verdict being a general one, the case was remanded for trial on the count as to common law negligence upon which count the Court held the evidence to be sufficient to go to the jury (R. p. 341, *et seq.*). There is, of course, no final judgment in the case.

Argument.

Petitioner continues his persistent assumption that the dome step board is a "running board" in his statement of the case (B. pp. 2-4) and in his summary of argument (B. p. 5) declaring "that all running boards (which includes the defective board in this case) are covered by Section 11 of the Safety Appliance Act." This assump-

tion, no matter how oft repeated does not make it so. The Circuit Court said:

> "Nowhere . . . will there be found any reference to a dome step board by whatever name that device might be labeled" (R. p. 248).

The Court will observe that the respondent in its appeal to the Circuit Court specified error not only on the question that the dome step board was not an appliance covered by the Safety Appliance Act but also that petitioner was not entitled to the protection of the Act. The Circuit Court, having held that the dome step board was not covered by the Act, did not pass upon the question as to whether the petitioner could avail himself of its provisions. This point is made here so that both questions will be before the Court. However, in our view of the law this Court, too, will not reach the latter question.

Some tank car builders and owners provide dome steps or platforms for convenience of those loading or unloading cars, with and without railings. Some provide no such facility. None are *required*. Whether there shall be any such facility or device is a matter for the builder or owner to decide, and the type of facility is likewise a matter for their exclusive decision.

The dome step board is not a "running board". Running boards are specifically provided for in the Interstate Commerce Commission's regulations published as Title 49, Code of Federal Regulations, Sections 131.8 and 131.9, with number, dimensions and location and in no instance is a board of any kind required at the dome. The dome step board does not "run" anywhere. It is totally disconnected and disassociated from any other board. It sits apart from all other appliances and is purely for the convenience of those loading or unloading the tank car. It has nothing to do with the safety or movement of the car.

Petitioner relies heavily upon the case of *Illinois Central R.R. Co. v. Williams*, 242 U. S. 462. This case was decided in 1917 and involved an accident which occurred in 1913, at which time the Interstate Commerce Commission had not promulgated any regulations as provided in Section 12. This was clearly pointed out in the case of *ATeSF v. Scarlett*, 300 U. S. 471, decided in 1937, where this Court said:

> "In Illinois C. R. Co. v. Williams, 242 U. S. 462, 466, 61 L. ed. 437, 440, 37 S. Ct. 128, we held that Section 2 of the act requiring secure ladders, etc., was operative pending action by the Interstate Commerce Commission under Section 3. In the interim, we said, Section 2 had the effect of prescribing an absolute and imperative duty, of making the ladders and other appliances 'secure'; but that Section 3 contemplated that these appliances 'shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized . . .'."

Petitioner also cites *Southern Pacific v. Carson*, 169 F. 2d 734. This case involved the application of handbrakes by a member of the train crew, obviously a matter covered by the Safety Appliance Act. Here we have no question of train or car movement or railroad employe, or safety appliance, merely a loading appliance for convenience of non-railroad employes when the tank car is out of train service on an industrial spur.

Petitioner cites *Swinson v. CStPMdO*, 294 U. S. 529. This case involved a railroad employe using a safety appliance. *Coray v. Southern Pacific*, 335 U. S. 520, likewise cited, involved a railroad employe on a motor car injured by the sudden stopping of a preceding train due to defective air brakes. *Davis v. Reynolds*, 280 F. 363, merely held that whether a sill step was safe or not was a question

for the jury. It is respectfully suggested that none of these cases are in point here.

Respondent does not debate the question that "cars *requiring* secure ladders and secure running boards shall be so equipped"; this is the plain intent of the Act. However, respondent urges that (1) the dome step board is not a running board and (2) even if it was, it is not *required* but is optional with car owners and builders. The Court will note that the tank car in question (SHPX 21336) is owned by the Shippers Car Line Corporation and common carriers regulated by the Interstate Commerce Commission cannot refuse to accept such cars in interstate commerce when equipped as *required* by the Interstate Commerce Commission regulations under the Safety Appliance Act, irrespective of devices to facilitate loading and unloading. Both statements of fact agree that the car is unloaded through a flexible hose attached to an outlet at the bottom of the tank. The process of preparing the tank car for unloading requires work at the top of the car and at the bottom (See testimony of Shields R. pp. 131-132) and the devices incident to such process are not safety appliances. Nor are they *required* by the Act of Congress or any regulation of the Interstate Commerce Commission.

The photograph of the car involved clearly shows a "running board" the full length of the car, with a safety railing above it providing a continuous handhold for railroad employes passing over the running board. The dome step board is above the hand railing and no part of the running board system.

The Circuit Court correctly summarized the law:

> "For it is not every device with which a car might be equipped which comes under, and is governed by the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appli-

ances which are officially determined by law or regulation to be such."

Central Vermont Ry. Co. v. *Perry*, 10 F. 2d 132, 137;

Fleming v. *Richardson*, 24 N. W. 2d, 280 (Iowa, 1946);

Hill v. *M. St. P. & SS. M. Ry. Co.*, 200 N. W. 485 (Minn. 1924).

In conformity with the Scarlett decision, the court in *Jeffries* v. *Olsen*, 121 F. Supp. 463, 476, relied upon the well known rule that administrative regulations such as those made by the Interstate Commerce Commission have "the force and effect of law", the same as though prescribed in terms by statute. Being penal in their nature, the regulations must be strictly construed. *U. S.* v. *A & P Trucking Corp.*, 113 F. Supp. 549.

Comes now the question as to whether the petitioner can invoke the protection of the Safety Appliance Act:

The Safety Appliance Act does not purport to confer any right of action upon injured employes (or anyone else). It merely makes violation of its prohibitions unlawful. *Urie* v. *Thompson*, 337 U. S. 163. It cannot be regarded as wholly separate from and independent of the Federal Employers' Liability Act. It is supplemental to it, having the purpose and effect of facilitating *employe* recovery. *Urie* v. *Thompson*, 337 U. S. 163.

This case was decided in 1949 and was relied upon by District Judge Modarelli in rendering judgment in the case of *Matusiak* v. *Penn.*, 134 F. Supp. 681 in October 1955, sustaining motion of defendant to dismiss upon the ground that plaintiff failed to show he was an employe of the defendant railroad.

This is the identical situation here, it being admitted that petitioner is not an employe of the defendant rail-

road, or any railroad, but is an independent contractor engaged by the consignee to unload the tank car. See *Stevenson* v. *Lake Terminal R. Co.*, 42 F. 2d 357.

In *Patton* v. *Baltimore and Ohio Railroad Company, et al.*, 197 F. 732 (CA 3, 1952), plaintiff, employed by Duquesne Slag Company while temporarily engaged in repairing a railroad car was injured when the brakes failed due to a hidden or latent defect. The Court of Appeals for the Third Circuit reversed the District Court (99 F. Supp. 455), which had held that a non-railroad employee could invoke the Safety Appliance Act.

A similar situation was involved in *Reisberg* v. *Duluth, Missabe and Iron Railway Co.*, 47 NW 2d 113 (Minn. 1951), certiorari denied 342 U. S. 832, 96 L. ed. 630. Plaintiff, an employee of Zenith Dredge Company, was badly injured as result of an alleged defective hand brake; a safety appliance specifically provided for by the Act, when the brakes failed to prevent a run-away of cars downgrade and a collision with other loaded cars. The court recognized that:

> "The Zenith Dredge Company is, of course, not a common carrier engaged in Interstate Commerce. The Federal Safety Appliance Act does not apply to it. Its liability to its employees for injuries growing out of its operation on an engine and cars over its three mile system of tracks, as well as for other injuries sustained by its employees, is governed by the Workmen's Compensation Act of Minnesota. M. S. A. Sec. 176.10, *et seq.* The primary question to be determined here is whether an employee of the Dredge Company, injured in his line of duty, may recover under the Federal Safety Appliance Act against defendant, the owner of the car, but who was not hauling or permitting to be hauled, or using the car with a claimed defective brake on its line at the time of the accident".

In reliance upon *Paul* v. *D. M. & I. R. Co.*, 96 F. Supp. 578 (D. C., Minn. 1950), the court concluded:

> "In our opinion, it is clear that the Federal Safety Appliance Act has no application to our set of facts".

In denying plaintiff's motion for new trial in the *Paul* case, *supra*, the court ruled that:

> "* * * this Court has no right to extend its (Safety Appliance Act) protection to employees of the quarry company * * *".

In *Brady* v. *Terminal Railroad Association*, 82 L. ed. 615, 303 U. S. 10, this Court held that the employee of one railroad, a car repairer, could invoke the protection of the Safety Appliance Act if injured due to a violation of the Act by another railroad. There, plaintiff was an employee of the Wabash Railroad and a "Railroad Employee" in the language of the statute. This decision, decided long after *Fairport P. & E. R.* v. *Meredith*, *supra*, states that:

> "In the instant case, petitioner in the course of his duty (as a railroad employee) would have occasion to go upon the car and use the grab iron and accordingly the benefits of the statute would extend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work".

The Court further pointed out that:

> "The carrier still remains subject, by the express terms of the statute, to civil liability for injuries sustained by any railroad employee by reason of the defective equipment".

It will be noted that this Court did *not* say that the carrier remained subject by the express terms of the statute for civil liability for injuries sustained by anyone working about or going upon his business about the cars. Thus, the *Brady* case again limits liability under the statute in such cases to "Railroad Employees", and expressly states that plaintiff would not be entitled to the benefits of the Act "if he was outside the scope of the statute because of the special character of his work".

Conclusion.

1. The board which broke is not a running board.

2. The board which broke is not a safety appliance.

3. The board which broke is not *required*.

4. The Safety Appliance Act is not available to petitioner.

We respectfully submit that the judgment of the Court below was correct.

Respectfully submitted,

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